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No. 80-1577

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CITY OF MESQUITE,

Appellant,

v.

ALADDIN'S CASTLE, INC.,

Appellee,

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMUSEMENT AND MUSIC OPERATORS ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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QUESTION PRESENTED

Does the Mesquite ordinance deny to the owners or operators of coin-operated amusement machines or to the players of such machines under 17 years of age their rights to due process, equal protection and freedom of expression and liberty guaranteed by the First, Fifth and Fourteenth Amendments to the Constitution of the United States?

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Amusement and Music Operators Association, Inc. respectfully submits this brief amicus curiae. All of the parties to this cause, through their counsel, have consented to this filing;

their written consents supplied in accordance with Rule 36 have been filed with the Clerk of this Court.

IDENTIFICATION AND INTEREST OF THIS AMICUS

Amusement and Music Operators Association, Inc. is the national trade association of operators of coin-operated amusement games and jukeboxes. The Association has approximately 1500 members, most of whom are operators of these machines. Industry surveys indicate that there are estimated to be altogether between 3000 and 5000 operators, who operate possibly as many as 1,000,000 amusement games and jukeboxes, in about 300,000 establishments located in cities

and communities, large and small, throughout the United States. Amusement centers, such as Aladdin's Castle center in the shopping mall at Mesquite, Texas, account for substantial numbers of the coin-operated amusement machines that are now in operation.

The amusement games industry consists of the manufacturers of whom there are at least 13 in the United States (Amusement Device Manufacturers Association, amicus brief), the independent distributors of games machines, the operators, and the location owners referred to above. This amicus represents the operators.

There are many types of coin-operated amusement games, ranging all the

way from kiddie rides to the video-electronic devices that are so popular today. Some devices like the kiddie rides are designed mainly for entertainment of the very young. Some, like the modern pinball machines are equipped with "flippers," that emphasize the skill aspects of the games.[1/] Others

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[1/] Appellate courts in several states have recognized this. State v. Bloss, ___ Hawaii ___, 613 P. 2d 354 (1980); People v. Palazzolo, 62 Mich. App. 140, 233 N.W. 2d 216 (1975); Cossack v. City of Los Angeles, 114 Cal. Rptr. 460, 523 P. 2d 260 (1974). In State v. Bloss the Hawaii Supreme Court quoted with approval from the Michigan Court of Appeals' decision in the Palazzolo case as follows (___ Hawaii at p. ___, 613 P. 2d at p. 360):

"Modern pinball machines involve skill to a much greater extent because of the addition of 'flippers.' Flippers are bars operated by a pushbutton which can

1/ continued

like the coin-operated game of 'foosball,' are modelled after publicly popular sports, and sometimes are operated in organized tournaments where many players compete against each other. Still others simulate auto-racing and spaceship 'wars,' games which involve high degrees of hand-eye-ear coordination

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1/ continued

be used to flip the balls upwards, back into the playing field, thus keeping the ball in play longer and enabling the player to attain a higher score. Thus the difference between the old-style and modern pinball machines is apparent. Attaining a high score in the old-style flipperless game depended almost completely on chance. A modern pinball machine, however, armed with one or more pairs of flippers, allows for a much greater variance in scores, depending on the player's skill in manipulating the flippers."

and intense mental concentration. Coin-operated video games which are so popular today are probably the most complicated and sophisticated of all such amusement devices. Some of these are described in recent court decisions.[2/]

2/ Stern Electronics, Inc. v. Kaufman, (E.D.N.Y. decided May 22, 1981, at pp. 7-8):

"Stern's video game 'Scramble,' . . . presents on a screen a series of images projected by a cathode ray tube which depicts a spaceship similtaneously trying to navigate a mountainous airspace, destroy enemy fuel depots, evade deadly ground fire, and prevail in an aerial dog-fight, while at the same time watching carefully over a diminishing fuel supply. In essence, the work is a movie in which the viewer participates in the action as the fearless pilot controlling the space-ship."

Wnek Vending & Amusement Co., Inc. v. City of Buffalo, 343 N.Y.S. 2d 608,617 (1980):

"Today, coin-operated video games are distributed to shopping malls, movie

2/ continued

Coin-operated amusement games provide opportunities for players' personal participation, as well as for their viewing and listening entertainment. The games provide opportunities also for enhancement of physical skills as well as for stimulating mental exercise. Many of

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2/ continued

theatres, bowling alleys, roller rinks, pizzerias, and neighborhood grocery stores. Video games, originally introduced in Japan several years ago and mass-marketed in this country for the last eighteen months, have recently been adapted for use on television screens for home entertainment. A recent SPACE INVADERS competition in New York City, sponsored by a reputable manufacturer and distributor of video games, attracted over 4,000 entrants and awarded as the grand prize, not surprisingly, a $2,000 ASTEROIDS table top video game. (N.Y. Times, November 9, 1980 p. 24)."

the games also provide opportunities for the players to compete against each other or in tournaments. In the modern amusement center, where so many of the games machines are owned and operated, as at Aladdin's in Mesquite City, these machines provide wholesome entertainment, and they have earned the widely accepted place in modern society that they have achieved.

The question whether a municipal ordinance such as the one in this case is constitutionally valid is one of vital importance to all operators of coin-operated amusement machines, and the Court's decision will have significant impact upon them as well as the youthful customers who desire to play their

machines.

This amicus urges the Court to view the issues in this case in the context of the constitutional rights of all citizens who will be affected by the Court's decision — the businessmen who supply amusement and musical entertainment by means of coin-operated machines, and their customers, especially those under the prescribed age, who would play the machines.

SUMMARY OF THE ARGUMENT

The Fifth Circuit is correct in holding that the Mesquite ordinance does not meet the rational basis test and that it violates the constitutional rights of Appellee and Appellee's young customers under the First and Fourteenth Amendments

to the Constitution of the United States.

Contrary to Appellant's assertion, the applicable standard of review is not the paramount issue in this case. The ordinance does not meet the minimum rational basis test and, a fortiori, it does not meet the strict scrutiny test. Even if the strict scrutiny test is applied, however, the Fifth Circuit is correct in holding that the ordinance arbitrarily and discriminatorily violates both the rights of Appellee and its young customers to freedom of expression and liberty of association contrary to the First and Fourteenth Amendments to the Constitution of the United States.

Both courts below are correct in holding that the ordinance's language

"connection with criminal elements" is void for vagueness under the due process clause of the Fourteenth Amendment.

We adopt the arguments of the Appellee on all these issues and add our own on the specific issue of freedom to provide and to receive entertainment by coin-operated amusement machines in a carefully-run amusement center like Aladdin's.

ARGUMENT

The Mesquite ordinance denies to Appellee and its young customers their rights to provide and to receive entertainment by coin-operated amusement machines contrary to the First and Fourteenth Amendments to the Constitution of the United States.

The Mesquite city ordinance here in issue, Ordinance 1353, bans the playing of coin-operated amusement machines by persons under 17, unless accompanied by a parent or guardian, in commercial amusement establishments. The ordinance includes the following definition (see Jurisdictional Statement, pp. 11, 12):

> "Coin-Operated Amusement Machine — Means a machine or apparatus that may be played or operated by the insertion of a coin and on which games or tests of skill, chance or ability are played, including pinball machines, and any machine initiating games of sport, shooting, or guiding objects or any machine designed for amusement or relaxation, but not including machines for vending food, drink and tobacco products, music playing or recording or apparatus commonly known as kiddie rides." (Emphasis supplied).

Amusement establishments do not include those with less than three such machines

(Id. p. 12), or those operated by charities (Id. p. 11).

The ordinance's states justification is that coin-operated amusement establishments tend to attract youthful patrons, that the congregation of such patrons creates problems of policing in order to protect them from the influence of those who would promote gambling, drug sales, and other unlawful activities, and that it is vital to the safety and welfare of the inhabitants of Mesquite, since the City has a special duty to protect those of tender years and since the attraction of such establishments to those under 17 years is detrimental to them and to the health and welfare of the inhabitants. Yet no such ban applies to

the congregation of minors in other places where they normally congregate: parks, ballparks, sandlots, swimming pools, and movies, to name but a few. It does not even ban the congregation of minors, unaccompanied by parents, in amusement establishments so long as they do not play the coin-operated amusement machines. The net effect of the ordinance therefore zeroes in on an extremely narrow target.

The City's argument adds another justification: the prevention of truancy. Yet the ordinance applies on Saturdays, Sundays, and holidays, and during non-school hours on school days, and during summer vacations.

There is no contention that amuse-

ment machines or the games that are played on them are bad per se. There is no contention that the machines or the games intrinsically impose any kind of threat. There is not even a claim that sex, obscenity, drugs or liquor are shown on the machines. There is simply a claim that youths are attracted to commercially-operated, coin-operated amusement machines, and that they tend to congregate around such machines, where they are subject to the influence of gamblers, drug pushers and other evil-doers.

Indeed, there could hardly be an argument that amusement machines are bad per se. A body of law is developing which fairly extols such machines as

contributions to a person's mental development. State v. Bloss, supra, p. 4; People v. Palazzolo, supra, p. 4; Cossack v. City of Los Angeles, supra, p. 4; Stern Electronics, Inc. v. Kaufman, supra, p. 6; Wnek Vending & Amusement Co. v. City of Buffalo, supra, p. 6.

The Ordinance shows on its face that its target is the "congregation" of youths. But "congregation" is simply another way of saying "association," and the freedom of association is a First Amendment freedom. The City's task in upholding the Ordinance is compounded by the fact that the congregation of youths is for the purpose of entertainment, and "Entertainment, as well as political and

ideological speech, is protected" by the First Amendment. Schad v. Borough of Mount Ephraim, 101 S.Ct. 2176, 2181 (1981).

Schad is particularly pertinent. It came down on June 1, 1981, six months after the decision below, and so was not available to the Fifth Circuit. It makes the Fifth Circuit's decision well-nigh impregnable.

Schad struck down a zoning ordinance which banned the showing, by means of a coin-operated mechanism, of live nude dancing in any establishment in the Borough of Mount Ephraim. The Court said (101 S.Ct. 2176, 2181):

> "By excluding live entertainment throughout the Borough, the Mount Ephraim ordinance prohibits a wide

> range of expression that has long been held to be within the protections of the First and Fourteenth Amendments. Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee. (Citations omitted). Nor may an entertainment program be prohibited solely because it displays the nude human figure. 'Nudity alone' does not place otherwise protected material outside the mantle of the First Amendment. (Citations omitted). Furthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation."

Erznoznik v. City of Jacksonville, 422 U.S. 211, 95 S.Ct. 2268, 4 L. Ed. 2d 125 (1975), involved, as does the instant case, a city's police power to protect children. Jacksonville had adopted an ordinance making it unlawful to exhibit,

in drive-in theaters, motion pictures which involve a showing of nudity if such pictures could be seen from a public place. Appellant then brought a declaratory action to test the validity of the ordinance and the city defended on the ground, inter alia, that the ordinance was an exercise of its police power to protect children. It maintained that even though it could not prohibit the display of films containing nudity to adults, it could reasonably protect minors from this type of visual influence.

The Court held that this defense was insufficient and it invalidated the ordinance. In doing so it held that

"minors are entitled to a significant measure of First Amendment protection" and that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them" (Erznoznik v. City of Jackson, supra, at 212,213). The restriction against any showing of nudity was held to be too broad. The Court said,

> "Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors. See Tinker v. Des Moines

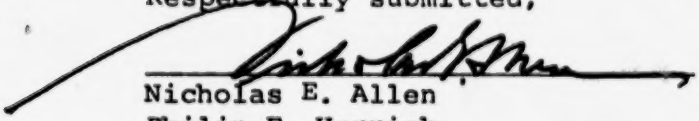
School Dist., supra. Cf. West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). Thus, if Jacksonville's ordinance is intended to regulate expression accessible to minors it is overbroad in its proscription." (Id. at 213, 214).

Schad and Erzoznik both involve freedom of speech, but it is no great step to go from freedom of speech to freedom of association. Each is a First Amendment freedom. Indeed, they are often overlapping. NAACP v. Alabama, 357 U.S. 449, 460, 78 S.Ct. 1163, 1171 (1958); Griswold v. Connecticut, 381 U.S. 479, 483, 85 S.Ct. 1678, 1681 (1965).

CONCLUSION

For the foregoing reasons we join the Appellees and respectfully urge the Court to affirm the decision of the Fifth Circuit Court of Appeals in its entirety.

Respectfully submitted,



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